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No. 88-834

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF CONNECTICUT, Petitioner

v.

GALEN PLOURDE, Respondent

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

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December 19, 1988

QUESTION PRESENTED

1. Does the due process principle first enunciated in Doyle v. Ohio, 426 U.S. 610 (1976), bar the prosecution's use of the defendant's post-Miranda, pre-arrest silence where: (1) the defendant received Miranda warnings from police officers, read them, acknowledged that he understood them and expressly refused to waive those rights; (2) the defendant was continuously in the presence of the same police officers who gave the Miranda warnings and subsequently conducted the interrogation which produced the defendant's silence or its equivalent in the face of a direct accusation; (3) immediately prior to the interrogation, the police told the defendant he was free to leave thus ending a three hour period of police custody; (4) before returning the defendant to his home, the police officers asked if he would stay and talk with them, to which the defendant responded that "he would sit and listen and [the police] could talk"; and (5) the defendant never waived his right to remain silent or right to counsel?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Galen Plourde respectfully requests the Court to deny the petition for a writ of certiorari, seeking review of the Connecticut Supreme Court's opinion. 1/ That opinion was decided on August 2, 1988, and is reported as State v. Plourde, 208 Conn. 455 (1988). 2/

STATUTORY PROVISIONS INVOLVED

The defendant was convicted of murder in violation of Conn. Gen. Stat. §53a-54a(a), which provides:

> A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

STATEMENT OF FACTS

The following corrections and additions to the facts

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1. All parties to the proceeding are named in the caption of this case.

2. Hereinafter, citation to the case is to the pages of the petitioner's appendix, Pet.App. at 1A-18A.

should be considered:

1. As stated by the petitioner and by the court, the State Police Detective Bates administered the Miranda warnings on the morning of December 18, 1983, and elicited the silence after a custodial search procedure which required the defendant to be transported from his home to the police troop barracks in Hartford. Pet. at 5A; Pet.App. at 10A. This sequence of events was accurate, but the time was not. Nor do these facts fully indicate the extent of the defendant's continuous custodial and "non-custodial" status which led up to his silence.

Two days before these events on the morning of December 16, 1983, the body of defendant's wife was found in her car which was parked in a lot behind a restaurant/cafe in the town of Cromwell. Pet.App. at 2A. She had left her home about 5:00 p.m. the previous night for a night out with a friend, and was last seen at about 11:00 p.m. Id. The defendant reported her failure to return home about 3:00 a.m. TH.43-44. 3/

The next day, the police drove the defendant from his home in the town of Berlin to the state morgue where he identified his wife's body. TI.125,147. He was eventually informed that the cause of death was by manual strangulation, and was later driven home by the same police. TM.67-68.

The following day, December 18, involved the specific events at issue. Detective Bates arrived at the defendant's Berlin home at about 4:00 in the afternoon, not in the morning. TO.90-92;Ex.104. He was armed with a search warrant for the defendant's person. Id. He explained his authority

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3. Citations for the individually paginated volumes of transcript are as follows: TH. - Transcript of 10/3/85; TI. - 10/4/85; TM. - 10/11/85; TO. - 10/17/85; TS. - 10/22/85; TT. - 10/23/85

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to the defendant and explained that he was being taken into custody for the duration of the procedures. TO.92. It was while they were at the house that Detective Bates advised the defendant of his Miranda rights from a preprinted form. TO.92-3. The defendant read the entire form, initialed all the spaces corresponding to the understanding of rights, but not the one on waiver. Pet.App. at 10A. He crossed out the word "waiver" and wrote in "understanding of rights." Id.

The defendant was driven first to Hartford Hospital for blood extraction, then to State Police Troop H Barracks in Hartford. TO.96-7. The search took about three hours. TO.98, 104, 113. It was about 7:17 on this winter night when the defendant was told he was free to go. TO.113-14. He was without an ability to get home to Berlin some twenty miles away, so they offered him a ride if he would wait. TO.114. They also asked if he would talk about the case; he "said that he would sit and listen and we could talk." Id; Pet.App. at 10A. Thereafter, the police detailed the evidence they had against him, accused him of killing his wife and asked him to give a statement. TO.115-18; Pet.App. at 10A-11A. It was in this context that the defendant's silence and his invocation of his right to counsel was elicited.

2. The petitioner states that the court concluded the Doyle violation was not harmless beyond a reasonable doubt. Pet. at 8. The conclusion was based on the court's own review of the record which it did despite the state's failure to "address this issue either in its brief or its argument to this court." Pet.App. at 14A-15A. The record reflected that evidence of the silence and the invocation of the right to counsel was admitted substantively to prove guilt. To make this clear to the jury, the state argued in its lead and rebuttal final arguments that this was proof of guilt. TS.29-

30,51. And the court charged the jury it could use the silence as proof of guilt. TT.33-5; Pet.App. at 14A n.11, 15A n.12. Moreover, the remainder of the evidence was entirely circumstantial and far from overwhelming. Pet.App. at 3A-7A. Respondent points this out to make it clear that this case does not involve the harmless error rule.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE DOYLE RATIONALE SUPPORTS THE RESPONDENT'S POSITION THAT ARREST AND/OR CUSTODY IS NOT A PREREQUISITE.

The essence of this claim, as in all Doyle claims, is the fundamental unfairness inherent in a situation where one arm of the government (the police) has assured a defendant that his silence will not be used against him while another arm of the government (the prosecution and/or the court) breaches that assurance and uses the silence at trial to convict or impeach him. Doyle v. Ohio, 426 U.S. 610, 619 (1976); Wainwright v. Greenfield, 474 U.S. 284, 291-92 (1986). The police assurances come from the warnings given pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), and include warnings that the person has, for example, to remain silent and to stop answering questions and the right to counsel prior to questioning. Such assurances provide by implication that silence will carry no penalty. Doyle v. Ohio, 426 U.S. at 618. Trial use of this silence breaches these assurances and "affront[s] ... the fundamental fairness that the Due Process Clause requires." Wainwright v. Greenfield, at 291; See, Doyle v. Ohio, at 618. 4/ Similarly, comment on a defendant's invocation of his rights also violates due process and Doyle. It makes no more sense to penalize a person for

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4. A second reason for excluding silence is that it is an unreliable indicator of guilt. Silence is "insolubly ambiguous," for it may be nothing more than the exercise of Miranda rights. Doyle v. Ohio, at 617; State v. Morrill, 197 Conn. 507, 535 (1985).

exercising his rights than it does to penalize for silence. State v. Pellegrino, 194 Conn. 279, 289-93 (1984).

a. Application Of The Rationale By The State Court. These statements are no more than a reiteration of this Court's oft-stated rationale for the Doyle rule and its progeny. See e.g., Greer v. Miller, 483 U.S. ___, 107 S.Ct. 3102, 3107 (1987); Wainwright v. Greenfield, 474 U.S. at 291-92; South Dakota v. Neville, 459 U.S. 553, 565 (1983); Fletcher v. Weir, 455 U.S. 603, 606 (1982); Anderson v. Charles, 447 U.S. 404, 408-09 (1980); Jenkins v. Anderson, 447 U.S. 231, 239-40 (1980); Doyle v. Ohio, 426 U.S. 610, 619-20 (1976). This is the very rationale used by the Connecticut Supreme Court in reaching its decision. Pet.App. at 11A-12A.

b. The Petitioner-state Misstates And Misconstrues The Doyle Rationale. The petitioner-state does not dispute: that the police administered the Miranda warnings; that the defendant heard and understood the rights contained in those warnings; that the defendant refused to waive his rights to remain silent and to have counsel present; that the police who administered the warnings and heard his response were the same police who later questioned him; that the defendant was involuntarily taken from his home and placed in continuous police custody for three hours; that the elicitation of the silence was immediately after that custody while the defendant was still in the police barracks on a winter's night waiting for a ride home.

The petitioner's sole dispute is with the rationale of Doyle. 5/ It conceives the rationale to be this: Doyle is

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5. The petitioner intimates the additional argument that the defendant, after being given his Miranda warnings and assurances, was required to assert his silence to obtain the protections of Doyle. Pet. at 13A n.3. The argument is not fully asserted. Nor is there any support for such a proposition. In that such an argument may have been made, the respondent argues it should be summarily dismissed. Further,

no more than a prophylactic rule designed to increase the efficacy of another prophylactic rule, that of Miranda, and as such Doyle is inapplicable unless the suspect's status satisfies the prerequisites for the giving of the Miranda warnings and the waiver of those rights. Pet. at 10A. That is, unless the person is in custody and under interrogation there is no such thing as a right against self-incrimination or a right to counsel or a right to due process. Id.

This misstates the rationale of this Court. As noted above, Doyle is intended to prevent the fundamental unfairness of the state reneging on assurances it freely gave. Having told the defendant that his silence would not be used against him, Doyle prevents that promise from being breached. Nowhere in the petition is there an explanation of how this oft-stated rationale fits within the petitioner's position.

c. The Rationale Dictates That Neither Arrest Nor Custody Is A Prerequisite To A Doyle Violation. A lack of custody is no reason to breach the assurances of the Miranda warnings.

First, the underlying concern for fundamental fairness is not advanced by a custody requirement. For it is the Miranda warnings themselves which give the affirmative assurances -- that silence will carry no penalty -- that are reasonably relied upon by individuals. Wainwright v. Greenfield, 474 U.S. at 291. Neither the warnings nor the assurances change with the person's status. A free person who is accused is as apt to rely upon the Miranda warnings and his constitutional rights as one who is in custody. See, State v. Wilson, 199

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any argument that the defendant's statement that "'he would sit and listen and [the police] could talk'" indicates a waiver of the right to silence was summarily rejected by the state court and should be similarly treated by this Court. Pet. at 6A-7A. It is hard to imagine how a person who wished to remain silent could be more explicit in saying so.

Conn. 417, 444 (1986).

Second, lack of arrest or custody does not solve the inherent reliability problem. Doyle, at 617. A free person's silence is just as "insolubly ambiguous" as any other's for he too may be doing nothing more than exercising constitutional rights.

Third, such a legal distinction is unworkable. It would require a person to know when he is (and is not) in custody or under arrest and that the plain words and assurances of Miranda are false in one case and true in the other. The warnings may be word-for-word the same in both cases, but the layman is supposed to know better.

Fourth, permitting the police to deceive an individual about the future use of his silence at trial is not a public policy which should be promoted. Police should not have a license to lie on a matter so crucial to a person's freedom.

The defendant here was given the assurances from a police officer that his silence would not be used against him and was entitled to rely on this. This is not a question of whether the Miranda rights had to be given when they were. It is the fact that they were given and given repeatedly. Objectively, the giving of the warnings meant the defendant had become a focus, albeit an unclear one. Since this defendant was so advised of his rights and their assurances, it was violative of due process to permit his silence and invocation into evidence.

2. THE LACK OF CASE SUPPORT FOR THE PETITIONER-STATE'S POSITION.

The weakness of the petitioner-state's position is shown by the cases it relies upon. In sole support for the proposition that Doyle is inextricably bound to Miranda's

custodial interrogation requirement, [6] it quotes a passage from Judge Easterbrook's concurring opinion in Phelps v. Duckworth, 772 F.2d 1410, cert. denied, 474 U.S. 1011 (1985). Pet. at 10A. The case, and therefore the dicta in this concurring opinion, is inapposite for several reasons. Factually, this case involved post-arrest silence and legally was decided on the basis that the defendant "did not remain silent after his arrest and Miranda warnings but instead testified that he had at least twice told the police he did not commit these crimes and made further protestations of innocence. Id., 1412. The conclusion was that Doyle did not apply. The case's other holding was that the prosecutorial comment on the silence was harmless error. Id., 1413-16. Second, Judge Easterbrook's observations were based on the premise that the prosecutor's use of the silence for impeachment fell outside the Doyle proscription. Id., 1422. Here, the use of the silence was different; it was to substantively prove the defendant's guilt. Further, in making his comments Judge Easterbrook adheres to this Court's Doyle rationale that a violation is based upon the breach of the assurances given by police in Miranda warnings. His comments are only to point out that a prosecutor may impeach a defendant who chooses not to remain silent. Id. Third, the prevailing rule of law in the 7th circuit appears to support the respondent, not the petitioner. In Fencl v. Abrahamson, 841 F.2d 760, 764-65 (7th Cir. 1988), the court concluded that prearrest, post-Miranda silence is violative of Doyle.

The petitioner-state's attempt to utilize Colorado v. Connelly, 479 U.S. 157 (1986), is also misplaced. Pet. at 11A. Connelly involved an allegedly mentally diseased citizen

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6. All other cases cited therein concern application and waiver of the Miranda rights. Pet. at 10A. They do not involve a Doyle violation.

who walked up to a police officer and gave him an unsolicited confession to a murder. The conclusion that the citizen's act was voluntary and did not rely on any government action is inappropriate here where the police gave the Miranda assurances and the defendant relied upon them.

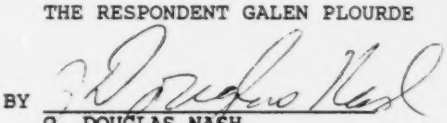
The petitioner's criticism that the state court misapplied the Wainwright v. Greenfield decision is erroneous. Pet. at 13A. While it is true that Greenfield did not hold that Doyle does not require arrest or custody, that was not the issue in the case, nor was it the proposition for which the state court cited it. The state court cited it for its recent expression of this Court's Doyle rationale. Pet.App. at 12A-13A. From the this Court's firmly placed "moorings," the state court did not cut itself loose. It applied the facts in a reasonable and logical way to protect a fundamental fairness.

Finally, the only case the state finds in support of its position is State v. Robinson, 496 A.2d 1067 (Me. 1985). Pet. at 14A. Admittedly, on this issue there are only this and the three cases cited at Pet. at 14A. But the presence of this one case does not present the significant type of conflict between courts of different jurisdictions which compel review by this Court.

CONCLUSION

In this case, Doyle v. Ohio was applied in a manner consistent with this court's decisions. For all of the foregoing reasons, the respondent respectfully requests this Court to deny the writ.

THE RESPONDENT GALEN PLOURDE

BY 

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